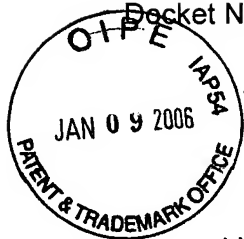


AF/ymw

Docket No. 54024-44719

PATENT



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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Reg. No. 32,653

In re application of: Hall, William A. :

Serial No.: 10/721,299 :

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APPELLANT'S BRIEF UNDER 37 CFR §41.67

(1) Real Party In Interest

The real party in interest in this Appeal is Buddeez, Inc. of Wentzville, Missouri, by way of an Assignment recorded on November 24, 2003, at Reel No. 014749 and Frame No. 0605.

(2) Related Appeals and Interferences

There are no appeals or interferences related to this Appeal.

(3) Status of Claims

Claims 1-20 are pending in the application and have been given a final rejection. This is an appeal of the Final Rejection of Claims 1-20.

(4) Status of Amendments

No amendments were filed after the Patent Office Final Rejection of claims 1-20, mailed October 6, 2005.

(5) Summary of Claimed Subject Matter

The subject matter defined by independent claim 1 is a food packaging closure apparatus 12, 66 that includes a tubular body 16, 72 having a length with opposite first 28, 84 and second 34, 88 ends. The second end 34 of the body has means for attaching the body second end 34 to packaging 56 of a food product 14 (specification page 5, lines 5-8, lines 11-13, and lines 15-18). The "means" is described in the specification on page 7, lines 6-9. A lid 18, 74 is removably attachable to the tubular body first end 28, 84 (specification page 6, lines 12-14).

The subject matter of the invention defined by dependent claim 2 is the second end 34, 88 of the tubular body 16, 72 having means for removably attaching the second end to packaging 56 around a food product 14 (specification page 7, lines 6-9).

The subject matter of the invention defined by dependent claim 3 is the tubular body 16, 72 having a first opening 32, 86 at the first end of the body, and the tubular body having a second open 36, 92 at the second end of the body (specification page 5, lines 15-18).

The subject matter of the invention defined by dependent claim 4 is the first opening 32, 86 being larger than the second opening 36, 92 (specification page 5, lines 19-21).

The subject matter of the invention defined by dependent claim 5 is the hollow interior bore extending through the body 16, 72 from the first end to the second end of the body (specification page 5, lines 14-18).

The subject matter of the invention defined by independent claim 6 is a food packaging closure apparatus 12, 66 comprising a tubular body 16, 72 having a length with opposite first 28, 84 and second 34, 88 ends. The second end of the body is adapted for attachment to a food product 14, 68 (specification page 5, lines 5-8, lines 11-13, and lines 15-18, and page 7, lines 6-

9). A lid 18, 74 is removably attachable to the first end of the body (specification page 6, lines 12-14); and the second end 34, 88 of the tubular body 16, 72 is resilient and engagable around the food product 14, 68 to attach the body to the food product (specification page 7, lines 6-9).

The subject matter of the invention defined by dependent claim 7 is the tubular body having an exterior surface 24, 78 and the tubular body having a rim 38, 94 extending around the first end of the body and projecting outwardly from the tubular body exterior surface (specification page 6, lines 2-3).

The subject matter of the invention defined by dependent claim 8 is the lid 18, 74 having a lip 52, 106 that engages over the body rim 38, 94 to removably attach the lid to the first end of the body (specification page 6, lines 10-14).

The subject matter of the invention defined by dependent claim 9 includes the lid 18, 74 being completely removable from the tubular body (specification page 8, lines 1-4).

The subject matter of the invention defined by dependent claim 10 is the tubular body 16 having a circular cross-section (specification page 5, line 18).

The subject matter of the invention defined by dependent claim 11 is the tubular body 72 having a rectangular cross-section (specification page 8, lines 14-18).

The subject matter of the invention defined by dependent claim 12 is the tubular body 16, 72 having a tapering configuration as the tubular body extends from the first end 28, 84 to the second end 34, 88 (specification page 5, lines 21-23, and page 9, lines 10-12).

The subject matter of the invention defined by dependent claim 13 is the tubular body having a tubular wall 22, 76 that extends the length of the body and has a first wall thickness at the body first end 28, 84 and a second wall thickness at the body second end 34, 88, and the first wall thickness is larger than the second wall thickness (specification page 5, line 23-page 6, line 6, and page 9, lines 4-7).

The subject matter of the invention defined by independent claim 14 is the method of preserving a food product 14, 68 in food packaging 56 that has a food packaging opening 54

(specification page 6, lines 15-23), the method comprising providing a tubular body 16, 72 that has a length with opposite first 28, 84 and second 34, 88 ends, positioning the body second end 34, 88 on the food product 14, 68 so that the body extends around the food packaging opening 54 (specification page 7, lines 1-19), providing a lid 18, 74 that is removably attachable to the body first end (specification page 6, lines 12-14), and removably attaching the lid 18, 74 to the body first end (specification page 7, lines 20-23).

The subject matter of the invention defined by dependent claim 15 is the tubular body 16, 72 being provided of resiliently stretchable material (specification page 5, lines 11-13), and resiliently stretching the body second end 34, 88 around the food product 14, 68 (specification page 7, lines 6-9).

The subject matter of the invention provided by dependent claim 16 is the method of positioning the body second end 34, 88 on the food product 14, 68 extending around the packaging 56 of the food product (specification page 7, lines 1-19).

The method of the invention defined by dependent claim 17 includes providing the lid 18, 74 where the lid is completely removable from the tubular body (specification page 7, line 20 - page 8, line 11).

The method of the invention provided by claim 18 includes providing the tubular body with a first opening 32, 86 at the body first end, a second opening 36, 92 at the body second end (specification page 5, lines 15-18), with a hollow interior bore extending through the body 16, 72 from the first end to the second end (specification page 5, lines 14-15), and with the first opening being larger than the second opening (specification page 5, lines 19-21).

The method of the invention defined by dependent claim 19 includes providing the tubular body 16 with a circular cross-section (specification page 5, line 18).

The method of the invention defined by dependent claim 20 includes providing the tubular body 72 with a rectangular cross-section (specification page 8, lines 15-18).

(6) Issues to be Reviewed on Appeal

The issues to be reviewed by this Appeal are:

(i) is the subject matter of the invention defined by claims 1-5, 7-9, 11-14, 16-18, and 20 anticipated under 35 U.S.C. §102(b) by the disclosure of the U.S. patent of Peebles et al. No. 5,964,365;

(ii) is the subject matter of the invention set forth in claims 6 and 15 made obvious under 35 U.S.C. §103(a) by the disclosure of the U.S. patent of Peebles et al. No. 5,964,365;

(iii) is the subject matter of the invention defined by claims 10 and 19 made obvious under 35 U.S.C. §103(a) by the disclosure of the U.S. patent of Peebles et al. No. 5,964,365 in combination with the Applicant's admitted prior art.

(7) Argument

The Rejection of Claims 1-5, 7-9, 11-14, 16-18 and 20 under §102(b)

Claims 1-5, 7-9, 11-14, 16-18, and 20 were rejected under 35 U.S.C. §102(b) as being anticipated by the disclosure of the U.S. Patent of Peebles, et al. No. 5,964,365. Of the rejected claims, claims 1 and 14 are independent claims. It is respectfully submitted that the Peebles reference fails to identically show the subject matter of the invention recited in claims 1 and 14, and therefore fails to anticipate the subject matter of the rejected claims. The rejection of the claims should therefore be withdrawn and the claims allowed.

In order for the subject matter of claim 1 to be anticipated by the Peebles reference, patent case law requires that the Peebles reference identically disclose every element of the invention set forth in claim 1. Claim 1 recites a food packaging closure apparatus. The common understanding and dictionary definition of the word "packaging" is the material used for making packages, such as a wrapped or boxed object. Food packaging is commonly understood to be the material used to wrap or box food. It is the material that seals and protects the food from contaminants. This is the meaning of "food packaging" provided by the specification.

Claim 1 requires that the apparatus be a “food packaging closure apparatus.” Although this language appears in the preamble of the claim, the counts of the claim also refer to the second end of the tubular body “having means for attaching the body second end to packaging of a food product.” This feature of the invention is not identically disclosed or even suggested by the Peeples reference. The interpretation of the Peeples reference to disclose this feature of the invention is based on hindsight of the invention.

The Peeples reference discloses a lid and collar system that is specifically designed for use with a pan or a dish, and not with a packaged food product as required by claim 1. The pan or dish disclosed by the Peeples reference is a cooking vessel, and not food packaging. The reference provides no disclosure of food packaging. Only the application specification mentions food packaging.

For a prior-art reference to anticipate, every element of the claimed invention must be identically shown in a single reference (emphasis added).

In re Bond, 910 F.2d. 831, 15 U.S.P.Q. 2d. 1566 (Fed. Cir. 1990).

To determine whether a claim limitation is meant literally where expressed as a means for performing a stated function, a court must compare the accused structure with the disclosed structure and must find equivalent structure as well as identity of claimed function for that structure (emphasis added).

Pennwalt Corp. v. Durand-Wayland, Inc., 833 F.2d. 931, 4 U.S.P.Q. 2d. 1737 (Fed. Cir. 1987).

The Peeples reference contains no suggestion of a food packaging closure apparatus having identity of the claimed function of “attaching the body second end to packaging of a food product” as required by the above-cited case law. The reference contains no suggestion of a second end that attaches to packaging of a food product, and clearly does not identically disclose the claimed function of attaching the body second end to packaging of a food product as required by claim 1. Under the above-cited case law, the Peeples reference fails to anticipate the subject matter of claim 1, and claim 1 and its dependent claims 2-13 are all allowable over the Peeples reference.

Claim 2 depends from claim 1 and requires the second end of the tubular body “having means for removably attaching the body second end to packaging around a food product.” Again, the Peebles reference fails to identically disclose this subject matter of the invention. Therefore, the reference fails to anticipate claim 2.

Claim 7 depends from claim 1 and requires that the tubular body have an exterior surface and a rim extending around the first end of the tubular body and projecting outwardly from the tubular body exterior surface. Claim 8 depends from claim 7 and further requires that the lid have a lip that engages over the rim of the tubular body. In the rejection of claim 8, it is contended that the Peebles reference discloses a rim 24, 26. However, the collar ridge 24 of the Peebles reference does not project outwardly from a tubular body exterior surface as required by claim 7. Therefore, the collar ridge 24 does not anticipate the subject matter of claims 7 and 8. The Peebles reference discloses a collar flange 26 that is angled downwardly from the collar ridge 24, but the Peebles reference does not disclose any lid having a lip that engages over the collar flange 26. Therefore, the Peebles reference fails to identically disclose the subject matter of claims 7 and 8, and fails to anticipate that subject matter.

Independent claim 14 is a method claim that describes a method of preserving a food product “in food packaging that has a food packaging opening.” The Peebles reference fails to identically disclose this subject matter. The Peebles reference is not remotely related to food packaging, but describes a lid and collar system used with a pan or dish cooking vessel.

We have frequently stated that the words of a claim “are generally given their ordinary and customary meaning.” *Philips v. AWH Corporation*, 415 F.3d 1303, 1312, 75 U.S.P.Q. 2d 1321 (Fed. Cir. 2005). We have made clear, moreover, that the ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective date of the patent application.

Importantly, the person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification. *Id.* at 1313.

The ordinary skilled artisan reviewing the subject matter of the patent application and claim 14 would interpret the claim terms as pertaining to a method of preserving food in food packaging having a food packaging opening. Without prior knowledge of the claimed invention, the ordinary skilled artisan would not interpret the food cooking vessels of the Peebles reference as being food packaging. This interpretation is based on hindsight of the present invention. For these reasons, and the same reasons set forth above with regard to claim 1, the Peebles reference fails to disclose every element of the claimed invention as required by the patent case law, and fails to anticipate the subject matter of claim 14.

Furthermore, claim 14 recites positioning the second end of the tubular body on the food product so that the tubular body extends around the food packaging. As explained above with regard to claim 1, the Peebles reference has no relation to food packaging. Food packaging is only mentioned in the application specification. The Peebles reference describes a lid and collar system that is used with a pan or dish that is a cooking vessel (see column 2, lines 51-55). There is no suggestion of using a lid and collar system with food packaging. For this additional reason, the Peebles reference fails to identically disclose the subject matter of the invention under the patent case law cited above. Claim 14 and its dependent claims 15-20 are therefore all allowable over the Peebles reference.

Claim 16 depends from claim 14 and further requires positioning the second end of the tubular body "on the food product extending around the packaging of the food product." Again, the Peebles reference provides no disclosure of positioning anything on packaging of a food product. This information is only provided by the application specification. The Peebles reference fails to identically disclose the subject matter of the invention as required by the above-cited patent case law, and therefore fails to anticipate the subject matter.

Rejection of Claims, 6, 11, 15, and 19 Under §103(a)

Claims 6, 11, 15 and 19 were rejected as being obvious under 35 U.S.C. §103(a) in view of the Peebles reference. As explained below, this rejection is based on a hindsight

interpretation of the Peeples reference disclosing a resilient second opening. For this reason, the rejection of these claims is made in error, and the claims are allowable over the Peeples reference.

To imbue one of ordinary skill in the art with knowledge of the invention in suit, when no prior art reference or references of record convey or suggest that knowledge, is to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher.

W.L. Gore & Associates, Inc. v. Garlock, Inc., 721 F.2d 1540, 220 U.S.P.Q. 303 (Fed. Cir. 1983)

Claim 6 depends from claim 1 and therefore includes the subject matter of claim 1, and also provides the additional structural limitation of the tubular body second end "being resilient and engagable around the food product." Claim 15 depends from claim 14 and therefore includes the subject matter of claim 14, and also provides the additional method limitations of providing the tubular body "of a resiliently stretchable material; and resiliently stretching the second end of the tubular body around the food product."

Contrary to the arguments made in the rejection of claims 6 and 15, the Peeples reference contains no disclosure of the collar 20 being resilient. The rejection of claims 6 and 15 interprets Figures 5A and 5B of the Peeples reference as disclosing a closure that is molded of plastic. The plastic being a resilient and stretchable material. This argument is based entirely on hindsight of the present invention, as there is no support for this interpretation of Figures 5A and 5B in the Peeples reference. The only support can be found in the application specification. Because the rejection of claims 6 and 15 is based on hindsight of the invention, the rejection is made in error. For this additional reason, claims 6 and 15 are allowable over the prior art of record.

It is respectfully submitted that in view of the arguments presented herein, the application is in condition for allowance. It is requested that the Final Rejection of claims 1-20 be reversed and the claims allowed.

An oral hearing is not requested.

Respectfully submitted,

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Claims Appendix

- 1) A food packaging closure apparatus comprising:
a tubular body having a length with opposite first and second ends, the second end of the tubular body having means for attaching the body second end to packaging of a food product; and,
a lid that is removably attachable to the first end of the tubular body.
- 2) The apparatus of Claim 1, further comprising:
the second end of the tubular body having means for removably attaching the body second end to packaging around a food product.
- 3) The apparatus of Claim 2, further comprising:
the tubular body having a first opening at the first end of the tubular body, and
the tubular body having a second opening at the second end of the tubular body.
- 4) The apparatus of Claim 3, further comprising:
the first opening being larger than the second opening.
- 5) The apparatus of Claim 2, further comprising:
a hollow interior bore extending through the tubular body from the first end to the second end of the tubular body.
- 6) A food packaging closure apparatus comprising:
a tubular body having a length with opposite first and second ends, the second end of the tubular body being adapted for attachment to a food product;
a lid that is removably attachable to the first end of the tubular body; and,

the second end of the tubular body being resilient and engagable around the food product to attach the tubular body to the food product.

7) The apparatus of Claim 1, further comprising:

the tubular body having an exterior surface and the tubular body having a rim extending around the first end of the tubular body and projecting outwardly from the tubular body exterior surface.

8) The apparatus of Claim 7, further comprising:

the lid having a lip that engages over the rim of the tubular body to removably attach the lid to the first end of the tubular body.

9) The apparatus of Claim 7, further comprising:

the lid being completely removable from the tubular body.

10) The apparatus of Claim 1, further comprising:

the tubular body having a circular cross section.

11) The apparatus of Claim 1, further comprising:

the tubular body having a rectangular cross section.

12) The apparatus of Claim 1, further comprising:

the tubular body having a tapering configuration as the tubular body extends from the first end to the second end.

13) The apparatus of Claim 1, further comprising:

the tubular body having a tubular wall that extends the length of the tubular body, the tubular wall has a first wall thickness at the tubular body first end and a second wall thickness at the tubular body second end, and the first wall thickness is larger than the second wall thickness.

14) A method of preserving a food product in food packaging that has a food packaging opening, the method comprising:

providing a tubular body that has a length with opposite first and second ends;

positioning the second end of the tubular body on the food product so that the tubular body extends around the food packaging opening;

providing a lid that is removably attachable to the first end of the tubular body;

and

removably attaching the lid to the first end of the tubular body.

15) The method of Claim 14, further comprising:

providing the tubular body of a resiliently stretchable material; and

resiliently stretching the second end of the tubular body around the food product.

16) The method of Claim 14, further comprising:

positioning the second end of the tubular body on the food product extending around the packaging of the food product.

17) The method of Claim 14, further comprising:

providing the lid where the lid is completely removable from the tubular body.

18) The method of Claim 14, further comprising:

providing the tubular body with a first opening at the tubular body first end, a second opening at the tubular body second end, a hollow interior bore extending through the tubular body from the first end to the second end, and the first opening being larger than the second opening.

- 19) The method of Claim 14, further comprising:
providing the tubular body with a circular cross section configuration.
- 20) The method of Claim 14, further comprising:
providing the tubular body with a rectangular cross section configuration.